

No. 96-1569

Supreme Court, U.S.
FILED

AUG 14 1997

In The

CLERK

Supreme Court of the United States

October Term, 1996

DANIEL BOGAN and MARILYN RODERICK,

Petitioners,

vs.

JANET SCOTT-HARRIS,

Respondent.

*On Writ of Certiorari to the United States
Court of Appeals for the First Circuit*

BRIEF OF AMICI CURIAE MASSACHUSETTS MUNICIPAL ASSOCIATION, CITY OF NEW BEDFORD CITY COUNCIL, MASSACHUSETTS CITY SOLICITORS AND TOWN COUNSEL ASSOCIATION IN SUPPORT OF PETITIONERS

GEORGE J. LEONTIRE
Counsel of Record
MICHELLE O. ROSEN
LEONTIRE & SHUB
Attorneys for Amici Curiae
66 Long Wharf
Boston, Massachusetts 02110
(617) 367-0333

71779

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz
Appellate
Services, inc.

51 P

TABLE OF CONTENTS

	Page
Interest of the <i>Amici Curiae</i>	1
Summary of Argument	1
Argument	2
I. The Decision by the Lower Court is Having a Direct and Adverse Impact on Pending Cases Involving the Question of Absolute Legislative Immunity.	2
II. Application of the Lower Court's Holding Renders Ineffective the Protections Offered to Legislators and is Contrary to Public Policy.	9
Conclusion	13

TABLE OF CITATIONS

Cases Cited:

<i>Acevedo-Cordero v. Cordero-Santiago</i> , 958 F.2d 20 (1st Cir. 1992)	7
<i>Berkley v. The Common Council of the City of Charleston</i> , 63 F.3d 295 (4th Cir. 1995), cert. denied, 116 S. Ct. 775 (1996)	11, 12
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259 (1993)	7
<i>Coffin v. Coffin</i> , 4 Mass. 1 (1808)	11

Contents

	<i>Page</i>
<i>Colon, et al. v. City of New Bedford, et al., No. 95-12212-REK (D. Mass. filed October 10, 1995)</i>	2, 4, 5, 6, 8
<i>Cutting v. Muzzey</i> , 724 F.2d 259 (1st Cir. 1984)	7
<i>Forrester v. White</i> , 484 U.S. 219 (1988)	7, 10
<i>Gorman Towers v. Bogoslavsky</i> , 626 F.2d 607 (8th Cir. 1980)	12
<i>Kuzinich v. County of Santa Clara</i> , 689 F.2d 1345 (9th Cir. 1982)	12
<i>Lagon v. Maryland</i> , 448 F. Supp. 935 (D. Md. 1977) ..	12
<i>Monell v. New York City Dep't of Social Services</i> , 436 U.S. 658 (1978)	12
<i>Reed v. Shorewood</i> , 704 F.2d 943 (7th Cir. 1983)	12
<i>Spallone v. United States</i> , 493 U.S. 265 (1990)	9, 11
<i>Supreme Court of Va. v. Consumers Union</i> , 446 U.S. 719 (1980)	8, 9
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951)	8
Statutes Cited:	
Mass. Gen. L. ch. 43, § 56	3
Mass. Gen. L. ch. 43, § 57	3

Contents

	<i>Page</i>
Mass. Gen. L. ch. 43, § 58	3
Mass. Gen. L. ch. 43, § 59	3
New Bedford City Ordinance Ann., Code § 2-20	3
New Bedford City Ordinance Ann., Code § 2-21	3
New Bedford City Ordinance Ann., Code § 2-40	3
New Bedford City Ordinance Ann., Code § 2-59	4
New Bedford City Ordinance Ann., Code § 2-76	4
New Bedford City Ordinance Ann., Code § 19-91	3
New Bedford City Ordinance Ann., Code § 19-96	4
New Bedford City Ordinance Ann., Code § 19-116 ...	3

APPENDIX

Appendix A — Amended Complaint in the matter of <i>Colon, et al. v. City of New Bedford, et al., No. 95-12212-REK (D. Mass. Filed October 10, 1995)</i>	1a
Appendix B — Selected Code Sections of the New Bedford City Ordinances Annotated	18a
Appendix C — Massachusetts General Laws Chapter 43, Selected Sections	21a

Contents

	<i>Page</i>
Appendix D — Memorandum and Order dated July 28, 1997 in the matter of <i>Colon, et al. v. City of New Bedford, et al.</i> , No. 95- 12212-REK (D. Mass. Filed October 10, 1995)	23a

INTEREST OF THE AMICI CURIAE

Amici, organizations whose members include the cities and towns of the Commonwealth of Massachusetts, the sitting New Bedford City Council, municipal officials throughout Massachusetts, and past and present city solicitors and town counsel, have a compelling interest in legal issues that affect state and local governments. *Amici*, and their members, have an especially strong interest in legal issues affecting municipal legislators and the integrity of the legislative process.¹

SUMMARY OF ARGUMENT

The lower court's holding is inconsistent with the rights conferred by the doctrine of absolute immunity.² By delving into the motives of individual legislators, the application of the standards articulated by the lower court results in an unwarranted and unnecessary intrusion by the judiciary into the legislative process, and the abrogation of the absolute immunity doctrine.

The questions raised by the Petitioners and the Court have been analyzed at length in the Petitioners' Brief on the merits submitted to the Court. The *amici curiae* agree with the Petitioners' brief on the merits, and have submitted this brief for the sole purpose of bringing to the Court's attention the ramifications and recent developments resulting from the decision rendered by the lower court.

1. The parties have consented to the filing of this brief *amici curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

2. The lower court's holding is sometimes referenced herein as "Scott-Harris".

ARGUMENT

I.

THE DECISION BY THE LOWER COURT IS HAVING A DIRECT AND ADVERSE IMPACT ON PENDING CASES INVOLVING THE QUESTION OF ABSOLUTE LEGISLATIVE IMMUNITY.

The decision of the Court of Appeals for the First Circuit has resulted in the abrogation of the intended protections of the absolute immunity doctrine in legislative areas other than position-elimination ordinances. Moreover, the *ad hoc* approach articulated by the court, whereby an activity is characterized as legislative or administrative depending on the motives of a legislator, has left legislators and the United States District Courts in the First Circuit without an objective standard by which to determine what actions constitute protected legislative activities.

The court of appeal's decision and its application of a "motivation standard" have a direct and immediate impact on pending cases involving the question of legislative immunity. By way of example, the *amici* wish to bring to the Court's attention the case of *Colon, et al. v. City of New Bedford, et al.*, No. 95-12212-REK (D. Mass. filed October 10, 1995). Plaintiffs in the *Colon* case filed a complaint in the United States District Court for the District of Massachusetts against the City of New Bedford, and the chief and various police officers of the New Bedford Police Department, seeking damages arising out of an alleged unjustified beating and arrest by certain New Bedford City police officers on October 15, 1992. The plaintiffs subsequently amended their complaint on December 13, 1996, and added five former and six current members of the New Bedford City Council in their individual capacity. The plaintiffs also added a former Mayor of New Bedford in his individual

capacity. The amended complaint is reproduced in Appendix A at App. 1a-17a. The plaintiffs look beyond the alleged wrongdoers and the typical defendants in this type of civil rights action, such as the police, municipality and the executive branch, and attempt to hold legislators liable in their individual capacity. See count six of the amended complaint "Supervisory Liability". App. at 15a.

In their amended complaint, the plaintiffs allege that the New Bedford City Councilors, through their acts and omissions, displayed a reckless or callous and deliberate indifference to the constitutional rights of the people who would come in contact with the New Bedford Police employees. See App. at 15a, ¶ 48. Specifically, the plaintiffs allege that as City Councilors and members of the City Council Public Safety Subcommittee, the City Councilors were policy-making officials of the New Bedford Police Department, and were responsible for investigating and studying all matters relative to the safety of the lives of the people of the City of New Bedford, for promulgating rules and regulations for the governance and management of the New Bedford Police Department, and for supervising and training New Bedford Police employees.³ App. at 5a and 15a, ¶¶ 15 and 48. Plaintiffs further allege that the City Councilors employed a grossly deficient system of investigating misconduct by on-duty police officers, failed to assure that allegations of beatings and wrongful arrests were properly investigated, and failed to take reasonable steps to prevent such incidents. App. at 15a, ¶ 48.

3. The individual city councilors and city council body have no authority to supervise and train the police department. All supervisory authority rests exclusively with the executive branch of government, the Mayor and police chief. See New Bedford City Ordinance Ann., Code §§ 19-91, 19-116, 2-20, 2-21 and 2-40. App. at 18a-20a. Also see Mass. Gen. Laws ch. 43, §§ 56, 57, 58 and 59 (establishing Plan "B" government by Mayor and Council). App. at 21a-22a. The Plaintiffs allege that the failure to supervise and train arose out of failure to engage in certain legislative functions and from an implied duty arising out of the activities described in Footnote 7.

The underlying theory in both the *Scott-Harris* case and the *Colon* case is substantially similar. In the *Scott-Harris* case, the plaintiff claimed that the defendant mayor and councilor violated her right to free speech by the passage of a position-elimination ordinance. The plaintiffs in the *Colon* case claim that the failure of the individual city council members to undertake certain legislative functions in a particular manner caused the alleged injuries inflicted by the police officers. The conduct at issue in *Scott-Harris* involves a legislative activity (*i.e.*, the passage of a position-elimination ordinance); similarly, the conduct in *Colon* involves legislative activities (*i.e.*, the authority of the City Council to investigate matters of public safety,⁴ to promulgate rules and regulations for adoption by the Mayor regarding the operation of the police department,⁵ and to hold a police disciplinary hearing at the discretion of the Mayor⁶). Both cases allege a violation of the plaintiffs' civil rights. In both cases, the plaintiffs seek to hold legislators personally liable for their legislative activities.⁷ The councilor

4. See New Bedford City Ordinance Ann., Code §§ 2-59 and 2-76. App. at 19a.

5. See New Bedford City Ordinance Ann., Code § 19-96. App. at 20a.

6. See New Bedford City Ordinance Ann., Code § 19-116. App. at 20a.

7. Separate and apart from Plaintiffs' claim in *Colon* that the city councilors failed to take certain legislative actions, the Plaintiffs also claim in their Memorandum in Opposition to the Defendants' Motion for Summary Judgment that the city councilors engaged in administrative activities which created an implied duty to supervise the police department. In support of this claim, Plaintiffs cited some sixty-two (62) matters over an eight (8) year period. These matters, by and large, addressed constituents' requests and complaints which were communicated to the New Bedford Police Department sometimes by an individual city councilor and sometimes by the city council

(Cont'd)

and mayor in *Scott-Harris* were found personally liable based upon their "improper motives", and further, that they acted "maliciously" or with "reckless indifference". Joint Appendix at 149-153. Similarly, the foundation of the plaintiffs' claim in *Colon* is that the city councilors' failure to investigate and legislate constitute "deliberate indifference". In both *Scott-*

(Cont'd)

body. The Plaintiffs examined these matters in detail and argue that they represent administrative acts which indicate that the New Bedford City councilors supervised the Police on a case by case basis. The Plaintiffs found five (5) of these matters particularly noteworthy, apparently due solely to the fact that the communications used the word "direct" rather than "request". Specifically, these "directives" included the city council "directing" the New Bedford Police Department to crack down on public drinking in the park (1987), to take care of serious problems of cherry bombs and unruly motorcycle gangs (1987), to note that a certain house may be operating as a store selling questionable items (1991), to enforce a cease and desist order against a local auto body shop (1992), and to monitor and evaluate the noise and large crowds on a particular street (1992).

Although an official acting outside the scope of his or her authority can be held liable for such action, the proposition that a legislator who fails to take an action, *i.e.*, to supervise the Police, should be held liable when such legislator has no legal duty or authority to engage in such activity is without precedent. Moreover, finding liability under such circumstances would be contrary to public policy. A city councilor engages in many functions and activities in the service of his or her constituents and the public good in general. One of the most important roles of a city councilor is to serve as a "first line of contact" between the public and other branches of the city government. When the street is not plowed, when there is public drinking in the park, when the garbage is not collected, when there is drag racing in the street, when a neighborhood association requests more police patrols, when a stop sign is needed, and when a hundred other such matters need attention, it is the city councilor who is first contacted. A city councilor should be able to receive the requests and complaints of the public and bring such concerns to the attention of the appropriate department of the city government for consideration and action without fear of having created an implied duty to take further actions as suggested by the theory proffered by the Plaintiffs in the *Colon* case.

Harris and Colon, the plaintiffs seek to attribute “improper motives” to the legislative activities, thereby converting legislative activities into administrative functions.

The eleven city councilors in the *Colon* case moved for summary judgment on the grounds that, *inter alia*, they could not be held liable personally under the doctrine of absolute immunity. The Hon. Robert E. Keeton, presiding over the case in the United States District Court for the District of Massachusetts, dismissed without prejudice the city councilors’ motion for summary judgment. The Memorandum and Order is reproduced in Appendix D at App. 23a-33a. Since guidance from the Court was forthcoming in connection with the *Scott-Harris* case, the district court concluded that it would be imprudent to grant the motion for summary judgment on the grounds of legislative immunity and stayed further proceedings relative to the city councilors pending such guidance. App. at 27a-29a, 31a.

The district court in the *Colon* case also based its dismissal without prejudice of the motion for summary judgment on the failure of the city councilors to show that no genuine issue of material fact existed as to whether the city councilors’ actions were legislative or administrative. App. at 29a, 30a, 31a. The district court recognized that different formulas have been applied to determine whether a legislator is protected by the shield of absolute immunity. The *Colon* court applied the “functional approach”, citing *Scott-Harris* as follows:

Although legislative immunity is absolute within certain limits, legislators are not immune with respect to all actions that they take. The dividing line is drawn along a functional axis that distinguishes between legislative and administrative acts. The former are protected, the latter are not. See *Acevedo-Cordero*, 958 F.2d at 23. We have

used a pair of tests for separating the two: *The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are “legislative facts,” such as “generalizations concerning a policy or state of affairs,” then the decision is legislative. If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on “the particularity of the impact of the state of action.”* If the action involves establishment of a general policy, it is legislative; if the action “single[s] out specifiable individuals and affect[s] them differently from others,” it is administrative. *Citing Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984) (citation omitted).

See App. at 29a-30a (citing *Scott-Harris*, 1997 WL 9102 at *13) (emphasis in original).

Although the *Colon* court references the “functional test”, the *Colon* court cites *Scott-Harris*, *Acevedo-Cordero*, and *Cutting*, which examine the legislators’ motives rather than applying an objective functional standard in determining whether an activity is legislative in nature, and thus immune from liability. The Court applies a “functional approach”, which examines “the nature of the function performed, not the identity of the actor who performed it.” *Forrester v. White* 484 U.S. 219, 222 (1988); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993).

The *Scott-Harris* approach frustrates the principal objectives

of the absolute immunity doctrine as evidenced by the *Colon* court's examination of the differences between legislative and administrative acts for determining whether immunity applies.

When the relevant facts are uncontested and sufficiently developed, the question whether an act is "administrative" as opposed to "legislative" is a question of law, and it may be decided by the judge on a pretrial motion. See Acevedo-Cordero, 958 F.2d at 23. When the material facts are genuinely disputed, however, the question is properly treated as a question of fact, and its disposition must await the trial.

See App. at 30a (citing *Scott-Harris*, 1997 WL 9102 at *12-*13) (emphasis in original). Given the nature of sophisticated pleadings, any legislator's motives could be questioned, thereby raising a question of fact and making a pre-trial determination unlikely. Absolute immunity is intended to be raised at the early stages of the litigation so as not only to protect legislators "from the consequences of litigation's results, but also from the burden of defending themselves." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731-732 (1980). This very premise was clearly articulated by the Court in *Tenney v. Brandhove*, when it held that absolute immunity:

would be of little value if . . . [legislators] could be subjected to the cost and inconvenience and distraction of a trial upon a conclusion of the pleader, or the hazard of a judgment against them based upon a jury's speculation as to motive.

Tenney, 341 U.S. 367, 377 (1951).

II.

APPLICATION OF THE LOWER COURT'S HOLDING RENDS INEFFECTIVE THE PROTECTIONS OFFERED TO LEGISLATORS AND IS CONTRARY TO PUBLIC POLICY.

As a matter of public policy, legislators, as individuals, must be protected from private civil actions arising out of traditional legislative activities. Absent such a policy there would be a chilling effect on the ability of legislative bodies to discharge their responsibilities and there would be a significant disincentive for private citizens to seek elective office. The public policy argument has been explored at length by the Court and articulated as follows:

[L]egislators must be free to represent their constituents "without fear of outside interference" that would result from private lawsuits. . . . Private lawsuits threaten to chill robust representation by encouraging legislators to avoid controversial issues or stances in order to protect themselves "not only from the consequences of litigation's results but also from the burden of defending themselves."

Spallone v. United States, 493 U.S. 265, 300 (1990) (citing *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731-32 (1980)).

Clearly, the courts have the difficult task of balancing two competing interests. On the one hand, there should be a method to remedy wrongful conduct and sanction a wrongdoer; on the other hand, legislators must be able to discharge their legislative

duties without fear of lawsuit so as to promote the efficient operation of government. The Court has discussed the balance of these interests and concluded that:

[s]uits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interest of the decision maker. Because government officials are engaged by definition in governing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to activities implicating the substance of their decisions in the cases before them.

Forrester v. White, 484 U.S. 219, 221 (1988) (citation omitted). The legislator's primary responsibility is to represent his or her constituency. To discharge this responsibility effectively,

legislators must be afforded meaningful immunity from private suit attempting to hold them personally liable for their legislative activities. Long ago, the Massachusetts Supreme Judicial Court expressed the following view of the legislative privilege, which was recently endorsed by the Court:

[t]hese privileges are thus secured, not with the intention of protecting the members against prosecution for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of persecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine this to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and any execution, of the office
...

Coffin v. Coffin, 4 Mass. 1, 27 (1808) (*cited with approval in Spallone v. United States*, 493 U.S. 265, 279 (1990)). What value would such esteemed reverence for the protection of the legislative process have if its protectorate "absolute immunity" was so easily disarmed by an allegation of improper motive as enunciated by the holding of the court of appeals?

The appropriate application of the absolute immunity doctrine does not prevent plaintiffs from seeking relief. Liability against the municipality is not precluded simply because the local legislators are immunized in their individual capacities. *Berkley v. The Common Council of the City of Charleston*, 63

F.3d 295 (4th Cir. 1995), (holding that a "municipality's liability for [the official acts of municipal policy makers] extends to acts for which the policy-making officials might enjoy absolute immunity because the acts were legislative or judicial in character") *cert. denied*, 116 S. Ct. 775 (1996), (*citing Reed v. Shorewood*, 704 F.2d 943, 953 (7th Cir. 1983)) *See also Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1350 (9th Cir. 1982) (complete immunity of county legislators does not immunize the county). Plaintiffs, in seeking to redress civil rights violations, have the remedy of maintaining an action against the municipality itself for monetary, declaratory and injunctive relief. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 663 (1978). The extraordinary intrusion into the legislative branch of government resulting from delving into the motives of the individual legislator is not necessary for plaintiff's remedy.

Local legislators are closer to controversies than their federal counterparts and should be afforded the full measure of protection offered by the absolute immunity doctrine. *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 612 (8th Cir. 1980), ("Because municipal legislators are closer to their constituents than either their state or federal counterparts, they are, perhaps, the most vulnerable to and the least able to defend lawsuits caused by the passage of legislation.") (*quoting Lagon v. Maryland*, 448 F. Supp. 935, 947 (D. Md. 1977)). Local legislators and lower courts need to apply a uniform standard in evaluating whether the activities of a local legislator fall within the protections of the absolute immunity doctrine. The standard articulated by the Court of Appeals for the First Circuit is inconsistent with the holdings of the Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

GEORGE J. LEONTIRE
Counsel of Record
 MICHELLE O. ROSEN
 LEONTIRE & SHUB
Attorneys for Amici Curiae
 66 Long Wharf
 Boston, Massachusetts 02110
 (617) 367-0333

**APPENDIX A — AMENDED COMPLAINT IN THE
MATTER OF COLON, et al. v. CITY OF NEW
BEDFORD, et al., No. 95-12212-REK (D. MASS.
FILED OCTOBER 10, 1995)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action 95-12212-REK

EDWIN TORRES COLON; JUANA COLON HERNANDEZ

Plaintiff

v.

CITY OF NEW BEDFORD, MASSACHUSETTS; STEPHEN GREANY, GARDNER GREANY, PAUL ROZARIO, WAYNE RIJO, CARL MORIN, CHRISTOPHER DEXTRADEUR, individually and as Police Officers of the City of New Bedford, Massachusetts; CHIEF RICHARD BENOIT, individually and as Police Chief of the City of New Bedford, Massachusetts; JOHN K. BULLARD, individually; FREDERICK M. KALISZ, JR., DAVID ALVES, BRIAN K. GOMES, THOMAS M. HODGSON, GEORGE ROGERS, JOHN T. SAUNDERS, DAVID J. GERWATOWSKI, CYNTHIA G. KRUGER, MARY S. BARROS, KENNETH M. FERREIRA, and MARK ZAJAC, individually

Defendants

Appendix A**FIRST AMENDED COMPLAINT****Introduction**

1. This is a civil rights action against police officers of the City of New Bedford, Massachusetts, the chief of police, Mayor, city council and the City arising from the beating of Edwin Torres Colon and Juana Colon Hernandez at the residence of Juana Colon Fernandez located at 385 Cottage Street, New Bedford on October 15, 1992. The complaint alleges that Mr. Torres and Ms. Colon were assaulted and Mr. Torres was wrongfully arrested by police officers on that evening. The complaint further alleges that the defendants chief of police, city council, and the City of New Bedford failed to properly train its police officers, tolerated and permitted a pattern of illegal beatings and arrests by on duty police officers, failed to properly investigate such incidents and discipline the officers involved, and failed to maintain a proper system for reviewing complaints of police misconduct by the public with the result that police officers of the City of New Bedford were encouraged to believe that they could violate the rights of people such as Mr. Torres and Ms. Colon with impunity.

Jurisdiction and venue

2. This action is brought pursuant to 42 U.S.C. § 1983 and the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded on 28 U.S.C. §§ 1331 and 1343.
3. The plaintiffs further invoke the supplemental jurisdiction of the Court, pursuant to 28 U.S.C. § 1337 and the pendant

Appendix A

jurisdiction of this Court to hear and decide claims arising under state law.

4. All individual parties are residents of Massachusetts. The municipal defendant is located in Massachusetts.

Parties

5. Plaintiff Edwin Torres Colon is a citizen of the United States and a resident of the Commonwealth of Massachusetts.
6. Plaintiff Juana Colon Hernandez is a citizen of the United States and a resident of the Commonwealth of Massachusetts.
7. Defendant Stephen Greany was at all times mentioned herein a duly appointed officer of the police department of the City of New Bedford, Massachusetts. He is named individually.
8. Defendant Gardner Greany was at all times mentioned herein a duly appointed officer of the police department of the City of New Bedford, Massachusetts. He is named individually.
9. Defendant Paul Rozario was at all times mentioned herein a duly appointed officer of the police department of the City of New Bedford, Massachusetts. He is named individually.
10. Defendant Wayne Rijo was at all times mentioned herein a duly appointed officer of the police department of the

Appendix A

City of New Bedford, Massachusetts. He is named individually.

11. Defendant Carl Morin was at all times mentioned herein a duty appointed officer of the police department of the City of New Bedford, Massachusetts. He is named individually.
12. Defendant Christopher Dextradeur was at all times mentioned herein a duly appointed officer of the police department of the City of New Bedford, Massachusetts. He is named individually.
13. Defendant Richard Benolt is and was at all times described in this complaint Police Chief of the City of New Bedford. As such he was the commanding officer of defendants Stephen Greany, Gardner Greany, Paul Rozario, Wayne Rijo, Carl Morin and Christopher Dextradeur and was responsible for the training, supervision, and conduct of officers of the New Bedford Department, he is also responsible for enforcing the regulations of the New Bedford Police Department and for ensuring that New Bedford police officers obey the regulations of the New Bedford Police Department and the laws of the Commonwealth of Massachusetts and the United States. As chief of the New Bedford Police Department, he was a policy making official of the City of New Bedford. He is named individually and in his official capacity.
14. Defendant John K. Bullard was at all times described in this Complaint Mayor of the City of New Bedford. As such he was responsible for the overall training, supervision and conduct of the New Bedford Police

Appendix A

Department. He was also responsible by law for ensuring that New Bedford police officers obeyed the regulations of the New Bedford Police Department and the laws of the Commonwealth of Massachusetts and the United States. He was the highest policy making official of the City of New Bedford. He is named individually.

15. The defendants Frederick Kalisz, Jr., David Alves, Brian Gomes, Thomas M. Hodgoon, George Rogers, John T. Saunders, David J. Gerwatowski, Cynthia G. Kruger, Mary S. Barros, Kenneth M. Ferreira and Mark Zajac were at all times described in this complaint city councillors of the City of New Bedford and members of the public safety committee. As city councillors and members of the public safety committee, they were policy making officials of the New Bedford Police Department. The city councillors, as policy makers and members of the public safety committee, were responsible for investigating and studying all matters relative to the safety of the life of the people of the City of New Bedford and for promulgating and regulations for the governance and management of the New Bedford Police Department. They were responsible for supervising and training New Bedford police employees. They are named in their individual capacities.
16. The defendant City of New Bedford is a municipality incorporated under the laws of the Commonwealth of Massachusetts and at all relevant times employed the defendants Stephen Greany, Gardner Greany, Paul Rozario, Wayne Rijo, Carl Morin and Christopher Dextradeur as police officers, the defendant, Richard Benoit as Police Chief, the defendant John K. Bullard as

Appendix A

Mayor and the defendants Frederick Kalisz, David Alves, Brian Gomes, Thomas Hodgson, George Rogers, John Saunders, David Gerwatowski, Cynthia Kruger, Mary Barros, Kenneth Ferreira and Mark Zajac as city councillors.

17. The defendants Stephen Greany, Gardner Greany, Paul Rozario, Wayne Rijo, Carl Morin, Christopher Dextradeur, and Richard Benoit were acting under color of state law and pursuant to their authority as police officers and Police Chief of the City of New Bedford in all actions alleged in this Complaint.

Factual Allegations

18. On October 15, 1992, Edwin Torres Colon was approached by New Bedford Police Officer Stephen Greany outside his mother's home at 385 Cottage Street, New Bedford as he was working on his car.
19. Officer Greany, without offering any explanation, informed Mr. Torres that he was under arrest.
20. Officer Greany then asked Mr. Torres his name. When Mr. Torres responded Officer Greany accused him of using a false name at which time Mr. Torres resumed to the house to get his identification.
21. Upon entering the house Mr. Torres stated that he was being confused with someone else and was going to get his identification.
22. Immediately thereafter, Officers Rozario, Greany, Morin,

Appendix A

Dextradeur and Detective Greany illegally broke in the door, hitting Ms. Colon in the head.

23. The officers entered the apartment with their weapons drawn. One of the officers punched Mr. Torres in the eye, causing him to fall to the floor. Officers Greany and Morin then dragged Mr. Torres into the bedroom and pushed him onto the bed.
24. Mr. Torres was struck repeatedly in the back with a club and punched in the head. The officers cuffed Mr. Torres. While Mr. Torres was cuffed, Officer Greany struck him on the arm and right leg with his club. —
25. Throughout the attack on her son, Ms. Colon pleaded with the officers not to hit Mr. Torres. When she attempted to stop them from hitting her son, one of the officers struck her on the hand with his club and pushed her onto the bed.
26. Officers Morin and Greany wrongfully placed Mr. Torres under arrest for two counts of assault and battery on a police officer, assault by means of a deadly weapon and for being a disorderly person in order to cover up their own wrongdoing.

Appendix A

COUNT ONE
PHYSICAL ABUSE
(42 U.S.C. § 1983 claim)

The plaintiff repeats and realleges all the foregoing paragraphs.

- 27. The physical abuse of Mr. Torres and Ms. Colon by the defendants was unjustified and unwarranted.
- 28. The defendants Stephen Greany, Gardner Greany, Morin, Dextradeur, Rozario and Rijo deprived Mr. Torres and Ms. Colon of the following clearly established and well-settled rights, as protected by the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.
 - a. Freedom from the use of excessive and unreasonable force;
 - b. Freedom from the deprivation of liberty without due process of law; and
 - c. Freedom from summary punishment.
- 29. The defendants subjected Mr. Torres and Ms. Colon to these deprivations of their rights maliciously and with a reckless disregard for whether Mr. Torres and Ms. Colon's rights would be violated by their actions.

Appendix A

COUNT TWO
WRONGFUL ARREST
(42 U.S.C. § 1983 claim)

The plaintiff repeats and realleges all the foregoing paragraphs.

- 30. The defendants had no probable cause or reasonable grounds to arrest Mr. Torres at the time he was taken into custody.
- 31. The defendants wrongfully charged Mr. Torres with Assault and Battery on a Police Officer, Assault by Dangerous Weapon and with being a Disorderly Person in order to justify their verbal and physical abuse of Mr. Torres and to cover up their own wrongdoing.
- 32. As a result Mr. Torres was deprived of his liberty without due process of law in violation of his rights as protected by the Fifth and Fourteenth Amendments to the United States Constitution.

COUNT THREE
POLICY AND PRACTICE CLAIMS
(42 U.S.C. § 1983 claim)

The plaintiff repeats and realleges all the foregoing paragraphs.

- 33. The Rules and Regulations of the New Bedford Police Department ("Department Regulations"), section 501.13, state that police officers shall be responsible for the proper safeguard of any person in their custody under arrest or

Appendix A

detention. This regulation states that any abusive words or actions against persons in custody shall subject the officer to disciplinary action.

34. Additionally Section 512 of the Departmental Regulations states that the unnecessary use of physical force by an officer constitutes gross misconduct.
35. Nonetheless, In violation of Section 501.13 of the Departmental Regulations prior to October 15, 1992, the City of New Bedford through its policy makers permitted and tolerated a pattern and practice of unjustified, unreasonable and illegal beatings and verbal abuse of persons arrested by police officers of the City of New Bedford. Although such conduct was improper, the officers involved were not prosecuted, disciplined or subjected to retraining and such incidents were in fact covered up with official claims that the conduct was justified and proper. As a result, New Bedford police officers were caused and encouraged to believe that persons could be subjected to verbal and physical abuse under circumstances not requiring the use of such abuse, and that such unjustified, unreasonable and illegal conduct would be accepted by the City of New Bedford.
36. Examples of the City of New Bedford's pattern and practice of unjustified, unreasonable and illegal beatings, deprivation of medical attention, verbal abuse of and illegal acts against persons arrested by police officers prior to October 15, 1992 include the following civil actions in the United States District Court for the District of Massachusetts:

Appendix A

- a. *Magnett v. Polletier, Chief of Police of the City of New Bedford, CA 71-229-C* (Unlawful entry by police into apartment.)
- b. *Weeks v. Gffford, et al., CA 77-3143-S* (Defendant New Bedford Police Officers violated plaintiffs civil rights.)
- c. *Assaf v. City of New Bedford, et al., CA 84-2130-WD* (Defendant Police officers violated plaintiffs civil rights.)
- d. *McKenna, et al. v. Officer Thomas Conloy, Jr., CA 88-523-S* (Officer assaulted and beat the plaintiffs and violated their civil rights).
- e. *Fisher v. City of New Bedford, et al., CA 88-0067-N* and *Bretton v. New Bedford, et al., CA 88-0101-N* (Officers beat plaintiffs in cruiser and at police station in the presence of commanding officers, then refused medical care. City conducted sham investigation designed to hide its culpability. City maintained practice and policy of covering tip allegations of brutality.)
- f. *Milosek v. City of New Bedford, et al., CA 88-2366-MA* (Officers beat plaintiff in police cruiser. Supervisory officers at police station failed to inquire as to cause of plaintiffs injuries, and refused to conduct a proper investigation of officers' brutal misconduct. City maintained practice and policy of covering up allegations of brutality.)
- g. *Costa v. City of New Bedford, et al., CA 91-11337-H* (Wrongful arrest. City had policy or practice of failing to properly train officers in arrest procedures.)

Appendix A

- h. *Gonsalves v. City of New Bedford, et al.*, CA 91-11993-WF (Decedent died in custody after being beaten by police and denied medical attention. City had policy or practice of failing to properly train officers in arrest procedures, and in determining when detainees are in need of medical attention.)
- i. *Flalho, et al. v. Officer Thomas Flood*, CA 91-13054 (Illegal arrest where the officer assaulted and beat the plaintiffs and violated their civil rights.)
- j. *Luz Monica Rodriguez, et. al. v. Elaine Silvs, et. al.*, CA 94-10430-MEL (Officers subjected plaintiffs to unconstitutional strip search and body cavity examination in a police cruiser on a public street in New Bedford.)
- 37. Additional lawsuits alleging police brutality and a failure to properly train New Bedford police officers have been filed in the state courts.
- 38. The City of New Bedford maintained a deficient system of reviewing claims of unjustified, unreasonable and illegal beatings and verbal abuse of arrested persons. This deficient system failed to identify the misconduct by officers and failed to subject officers who engaged in such misconduct to discipline, closer supervision or retraining, to the extent that it has become the *de facto* policy and custom of the City of New Bedford to tolerate such improper conduct by police officers.
- 39. Specific systemic flaws in the City of New Bedford's misconduct review process include, but are not limited to, the following:

Appendix A

- a. Reports of investigations of misconduct incidents were prepared as routine point-by-point justifications police officer's actions, regardless of whether such actions were justified;
- b. Police officers investigating misconduct incidents systematically failed to credit testimony by non-police officer witnesses, and uncritically relied on reports by police officers involved in the incident;
- c. Police officers investigating misconduct incidents failed to include in their reports relevant factual information that contradicted the statements of the police officers involved;
- d. Supervisory police officers issued public statements exonerating police officers for misconduct before the investigation of the incident by the police department had been completed;
- e. Reports in misconduct cases were not reviewed for accuracy by supervisory officers. Conclusions were permitted to be drawn on the basis of clearly incorrect or contradictory information.
- 40. Additionally, the New Bedford Police Department tolerated a practice of officers failing to report incidents of abuse by other officers toward persons in custody, in violation of Section 501.10 of the Departmental Regulations, which regulation requires officers observing or becoming aware of violations of regulations to report such violation to a commanding officer. As a result the New Bedford Police Department had a custom or policy

Appendix A

of officers failing to report abusive conduct by other officers.

41. The foregoing acts, omissions, systemic flaws, policies and customs of the City of New Bedford led police officers to believe that unjustified, unreasonable and illegal beatings and verbal abuse of arrested persons would not be aggressively, honestly and properly investigated, with the foreseeable result that officers were more likely to use force and verbal abuse in situations where such force and verbal abuse was neither necessary nor reasonable.
42. The City of New Bedford was required by Article XXVI of an Agreement between the City of New Bedford and the New Bedford Police Union to "provide a regular in-service training program for all officers designed to improve the quality of Police protection in the city."
43. As a direct and proximate result of the aforesaid acts, omissions, systemic flaws, policies and customs of the defendant City of New Bedford, the defendant police officers beat and verbally abused Mr. Torres and Ms. Colon, which was a direct and proximate cause of their injuries.

**COUNT FOUR
ASSAULT AND BATTERY
(Massachusetts tort claim)**

The plaintiff repeats and realleges all the foregoing paragraphs.

44. The defendant police officers assaulted and battered Mr. Torres and Ms. Colon.

Appendix A

**COUNT FIVE
MASSACHUSETTS RIGHTS ACT VIOLATIONS
(G.L. c. 12 §111 claim)**

The plaintiff repeats and realleges all the foregoing paragraphs.

45. The defendants violated Mr. Torres and Ms. Colon's rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution and under Articles One, Fourteen and Twenty-six of the Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts.
46. The above actions of the defendant were taken by means of threat, intimidation and coercion.
47. As a result, the defendants violated Mr. Torres and Ms. Colon's rights as protected by G.L. c. 12 §111.

**COUNT SIX
SUPERVISORY LIABILITY**

The plaintiff repeats and realleges all the foregoing paragraphs.

48. The actions and omissions of defendants Benoit as Chief, Bullard as Mayor and Frederick Kalisz, Jr., David Alves, Brian Gomes, Thomas Hodgson, George Rogers, John Saunders, David Gerwatowski, Cynthia Kruger, Mary Barros, Kenneth M. Ferreira and Mark Zajac as city councillors in investigating allegations of misconduct by civilians against on duty New Bedford police employees

Appendix A

and in supervising and training New Bedford police employees displayed a reckless or callous indifference to the constitutional rights of others when it would be obvious to any reasonable official that his conduct was very likely to result in the violation of the constitutional rights of a person coming in contact with New Bedford police employees. The defendants acted with deliberate indifference to the constitutional rights of all those who would come in contact with the New Bedford police employees. The defendants employed a grossly deficient system of investigating allegations of misconduct by on duty police officers directed at people in the community and failed to assure that allegations of beatings and wrongful arrest were properly investigated and to take reasonable steps to prevent such incidents in New Bedford

DAMAGES

49. The above conduct by the defendants was a direct and proximate cause of Mr. Torres and Ms. Colon's injuries.
50. As a result of the false charges, Mr. Torres was forced to hire an attorney and endure the stress and humiliation of two criminal trials while defending himself from fabricated allegations.

WHEREFORE, the plaintiffs request that this court:

- a. Award compensatory damages against the defendants jointly and severally.
- b. Award punitive damages against the individual defendants.

Appendix A

- c. Award the plaintiffs their costs of this action, including attorney's fees in accordance with 42 U.S.C. § 1988 and M.G.L. c. 12 § 111.
- d. Award the plaintiffs prejudgment interest, and
- e. Award such other and further relief as this Court deems appropriate.

Jury trial demand

The plaintiff demands a trial by jury.

Edwin Torres Colon
 Juana Colon
 By their attorneys,
 s/ Robert A. Griffith
 ROBERT A. GRIFFITH
 BBO No. 211900
 CRANE M. POMERANTZ
 BBO No. 629701
 Schwartz, Shaw & Griffith
 30 Federal Street
 Boston, MA 02110
 (617) 338-7277

DATED: December 12, 1996

**APPENDIX B — SELECTED CODE SECTIONS OF THE
NEW BEDFORD CITY ORDINANCES ANNOTATED**

**CITED SECTIONS OF THE NEW BEDFORD CITY
CODE ORDINANCE**

Sec. 2-20. Executive head of city.

The mayor shall be the executive head of the city and charged with administrative responsibility.

(Code 1963, § 1-101)

Annotations — Dooling v. City Council of Fitchburg, 242 Mass. 599 (1922); 136 NE 616; Bell v. Treasurer of Cambridge, 310 Mass. 484 (1941)

State law reference — Similar provision, M.G.L.A. c. 43, § 58.

Sec. 2-21. Head of police and fire departments.

The mayor shall be the executive head and general directing authority in control and management of the police and fire departments, subject to limitations enumerated in this Code.

(Code 1963, § 1-113)

Sec. 2-40. Legislative power.

The legislative power of the city shall be vested in the city council.

(Code 1963, § 2-101)

Appendix B

Annotations — As to enactment of vetoed ordinances, see James v. New Bedford, 319 Mass. 74 (1946); as to enactment of salary ordinances, see the above case, and Morra v. New Bedford, 340 Mass. 240 (1960), 163 N.E. 2d 268; Souza v. New Bedford, 320 Mass. 541, 70 N.E. 2d 802.

Cross reference — Enactment, etc., of ordinances, §§ 1-4 — 1-7.

State law references — Similar provisions, M.G.L.A. c. 43, § 59; open meetings law, c. 39, § 23H.

Sec. 2-59. Duties in general.

The committees herein named shall perform such duties as are specifically provided by ordinance, and all such other duties as may properly come within the scope of the committee designation, subject however, to the direction of the city council. The city council may refer any matter to such of said committees as the nature of the subject would render appropriate for investigation and report.

(Code 1963, § 2-111)

Sec. 2-76. Duties of the committee on public safety.

The duties of the committee on public safety shall investigate and study all matters relative to the safety to the life of the people in the city and property located therein.

(Ord. of 4-10-86, § 1(11))

*Appendix B***Sec. 19-91. Duties of chief generally.**

The chief of police, subject to the orders of the mayor, shall be at the head of the police department, and shall have entire control of the department, and of special officers as hereinafter provided. The chief shall faithfully discharge the duties of the office and shall see that the laws of the state and ordinances of the city are duly observed and enforced, and shall promptly execute all orders of the mayor and council. (Code 1963, § 7-102)

Sec. 19-96. Rules and regulations by mayor and city council.

The mayor and council may make such further rules and regulations for the government and management of the police department as they may deem expedient. (Code 1963, § 7-110)

Sec. 19-116. Discipline.

The chief of police shall promptly report to the mayor all violations of duty on the part of any member of the police department, and the mayor may cause charges to be preferred thereon. The hearing on such charges shall be before the mayor and city council who may remove, suspend or fine for cause deemed by them sufficient, after due hearing, and subject to the provisions of civil service as set forth in Massachusetts General Laws, Chapter 31, section 41. (Code 1963, § 7-106)

**APPENDIX C — MASSACHUSETTS GENERAL LAWS
CHAPTER 43, SELECTED SECTIONS****CITED SECTIONS OF THE MASSACHUSETTS
GENERAL LAWS****PLAN B. — GOVERNMENT BY MAYOR AND COUNCIL
ELECTED BY DISTRICTS AND AT LARGE.****43:56. Plan B.**

Section 56. The method of city government provided for in the eight following sections shall be known as Plan B.

43:57. Operative date of plan.

Section 57. Upon the adoption by a city of Plan B, it shall become operative as provided in sections one to forty-five, inclusive.

43:58. Mayor as chief executive officer; election; tenure.

Section 58. There shall be a mayor, elected by and from the qualified voters of the city, who shall be the chief executive officer of the city. He shall hold office for the term of two years from the first Monday in January following his election and until his successor is qualified.

43:59. City council; number; election; tenure.

Section 59. The legislative powers of the city shall be vested in a city council. One of its members shall be elected by the council annually as its president. In cities having more than seven wards, the city council shall be composed of fifteen members, of whom one shall be elected from each ward by and from the

Appendix C

qualified voters of that ward, and the remaining members shall be elected by and from the qualified voters of the city. In cities having seven wards or less, the city council shall be composed of eleven numbers, of whom one shall be elected from each ward by and from the qualified voters of that ward, and the remaining members shall be elected by and from the qualified voters of the city.

At the first regular municipal election held in a city after its adoption of Plan B, except as otherwise provided in this section, the councillors elected from each ward shall be elected to serve for one year, and those elected at large shall be elected to serve for two years, from the first Monday in January following their election and until their successors are qualified; and at each regular municipal election thereafter the councillors elected to fill vacancies caused by the expiration of the terms of councillors shall be elected to serve for two years.

If the plan adopted provides for elections to be held biennially, at the first regular municipal election held under the provisions of such plan and at each biennial election thereafter, all the councillors whether elected at large or by wards shall be elected to serve for two years from the first day of January following their election and until their successors are qualified.

**APPENDIX D — MEMORANDUM AND ORDER DATED
JULY 28, 1997 IN THE MATTER OF *COLON, et al. v.
CITY OF NEW BEDFORD, et al.*, No. 95-12212-REK
(D. MASS. FILED OCTOBER 10, 1995)**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 95-12212-REK

EDWIN TORRES COLON and JUANA COLON
HERNANDEZ,

Plaintiffs -

v.

CITY OF NEW BEDFORD, STEPHEN GREANY, GARDNER GREANY, PAUL ROZARIO, WAYNE RIJO, CARL MORIN, CHRISTOPHER DEXTRADEUR, individually and as Police Officers of the City of New Bedford, CHIEF RICHARD BENOIT, individually and as Police Chief of the City of New Bedford, JOHN K. BULLARD, individually, FREDERICK M. KALISZ, JR., DAVID ALVES, BRIAN K. GOMES, THOMAS M. HODGSON, GEORGE ROGERS, JOHN T. SAUNDERS, DAVID J. GERWATOWSKI, CYNTHIA G. KRUGER, MARY S. BARROS, KENNETH M. FERREIRA, and MARK ZAJAC, individually,

Defendants

Appendix D

Memorandum and Order
July 29, 1997

Pending before the court at the hearing of July 28, 1997 were the following motions:

- (1) Council Defendants' Motion to Extend Time to File Answer (Docket No. 52, filed January 8, 1997).
- (2) Council Defendants' Motion for Summary Judgment as to Count VI of the Amended Complaint (Docket No. 53, filed January 17, 1997).
- (3) Plaintiffs' Motion to Compel (Docket No. 75, filed April 9, 1997).
- (4) Plaintiffs' Second Motion to Compel (Docket No. 78, filed May 15, 1997).
- (5) Plaintiffs' Motion for Attorney Fees (Docket No. 83, filed June 11, 1997).

The court heard argument on these motions on July 28, 1997 and announced its decisions orally. This memorandum confirms those rulings, and stated reasons for them, to aid the parties and the court in future proceedings in this case.

I. Background

This civil action arises from an incident that the plaintiffs allege occurred on October 15, 1992. The plaintiffs allege that, on that date, the plaintiff Edwin Torres Colon was assaulted and wrongly arrested by police officers of the City of New Bedford.

Appendix D

(Plaintiffs' First Amended Complaint ¶¶18-26.) The plaintiffs also allege that the police officers injured Ms. Juana Colon Hernandez, the mother of Edwin Torres Colon in the course of making this arrest. (Id.)

Several claims have been made against several defendants in this civil action. The plaintiffs have sued the City of New Bedford, several police officers of the City of New Bedford, the Police Chief, the Mayor, and the City Council.

The plaintiffs have made claims for physical abuse and wrongful arrest under 42 U.S.C. §1983. They also claim that the City of New Bedford, through its policy makers, permitted and tolerated a pattern of improper conduct by the New Bedford police force, and as such, the City of New Bedford is liable under 42 U.S.C. §1983. The plaintiffs further allege that the Chief of Police, the Mayor, and the city council members are liable under a theory of supervisory liability because:

[T]he acts and omission of the defendants . . . [Chief of Police, the Mayor, and the city council members] in investigating allegations of misconduct by civilians against on duty New Bedford police employees and in supervising and training New Bedford employees displayed a reckless or callous indifference to the constitutional rights of others when it would be obvious to any reasonable official that his conduct was very likely to result in the violation of the constitutional rights of a person coming in contact with New Bedford police employees. The defendants acted with deliberate

Appendix D

indifference to the constitutional rights of all those who would come in contact with the New Bedford police employees. The defendants employed a grossly deficient system of investigating allegations of misconduct by on duty police officers directed at people in the community and failed to assure that allegations of beatings and wrongful arrest were properly investigated and to take reasonable steps to prevent such incidents in New Bedford.

(¶48.)

The plaintiffs seek compensatory and punitive damages, as well as costs, attorney's fees, and prejudgment interest.

II. Motion to Extend Time

The individual city counsel member defendants (the "council defendants") request that this court enlarge the time to file an answer to the plaintiffs' amended complaint. The council defendants request that they be given until ten days after this court rules on the council defendant's Motion for Summary Judgment. In support of this motion, the defendants note that the attorney who filed the summary judgment motion is not the attorney the council defendants have chosen to act as counsel for other purposes in this civil action.

This motion is allowed.

Appendix D

III. Motion for Summary Judgment

The council defendants move for summary judgment on all counts against them on the grounds that, if the plaintiffs' allegations are true, they are entitled to absolute legislative immunity. These defendants argue that if they engaged in activities related to the police misconduct alleged by the plaintiffs, their activities were legislative in nature, thus entitling them to legislative immunity. The defendants further contend that this question is one of law, and is appropriately decided on a motion for summary judgment.

The plaintiffs counter that the council defendants' activities were administrative in nature, and thus the types of activities for which a legislator is not entitled to absolute legislative immunity.

After examining the briefs, and after oral argument on this motion, the court determines that there are two separate grounds for denying the motion for summary judgment at this time.

First, a question remains as to whether local legislators are entitled to absolute immunity from liability under §1983 for actions taken in a legislative capacity, like that given to state lawmakers.

The Court of Appeals for the First Circuit has recently reconsidered the question of whether local legislators, such as city council members, are entitled to the same absolute immunity afforded to state lawmakers and regional officials, stating:

The [Supreme] Court has yet to decide whether local legislators are protected by this

Appendix D

strain of absolute immunity, *see Lake Country Estates*, 440 U.S. at 404 n. 26, 99 S.Ct. at 1178 n. 6 (reserving the question), but the lower federal courts, including this court, have shown no reticence in holding that the doctrine of legislative immunity is available to such persons. We reaffirm today that the shield of legislative immunity lies within reach of city officials.

Scott-Harris v. City of Fall River, __ F.3d __, 1997 WL 9102, (1st Cir. Jan. 15, 1997) (citations omitted).

The Supreme Court has granted certiorari in the *Scott-Harris* case, putting particular emphasis on the question of whether local legislators are entitled to absolute legislative immunity. In granting the petition for certiorari, the Court stated:

The petition for a writ of certiorari is granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: Are individual members of a local legislative body entitled to absolute immunity from liability under 42 U.S.C. §1983 for actions taken in a legislative capacity?

1997 WL 181002 (U.S.).

An assertion by city council members of absolute immunity for their legislative acts is a threshold question. Although neither party briefed this issue, it would be imprudent for the court to dismiss the council defendants on grounds of legislative

Appendix D

immunity when guidance from the Supreme Court is expected soon.

The possibility that legislative immunity does not apply to local legislative bodies is but one reason this court should be hesitant to allow the council defendants' motion for summary judgment at this time. An alternative reasons is that the defendants have not shown that no genuine dispute of material fact exists as to whether the council defendants were acting in a legislative or instead an administrative capacity in connection with the incident that forms the basis for this civil action.

It is true that courts have prescribed several different formulas for a district court to use when considering whether a legislator is protected by the shield of absolute immunity. The Court of Appeals for the First Circuit has discussed the relevant distinctions, noting that:

Although legislative immunity is absolute within certain limits, legislators are not immune with respect to all actions that they take. The dividing line is drawn along a functional axis that distinguishes between legislative and administrative acts. The former are protected, the latter are not. *See Acevedo-Cordero*, 958 F.2d at 23. We have used a pair of tests for separating the two: The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If

Appendix D

the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on "the particularity of the impact of the state of action." If the action involves establishment of a general policy, it is legislative; if the action single[s] out specifiable individuals and affect[s] them differently from others." It is administrative. *Cutting v. Muzsey*, 724 F.2d 259, 261 (1st Cir. 1984) (citations omitted).

Scott-Harris, 1997 WL, 9102 at *12-*13.

The issues as to whether the actions taken by the city council here were legislative or administrative in nature may be a question of fact, but may also be a question of law. In discussing the difference between legislative acts and administrative acts for the purpose of determining whether immunity applies, the Court of Appeals for the First Circuit has stated the following test:

When the relevant facts are uncontested and sufficiently developed, the question whether an act is "administrative" as opposed to "legislative" is a question of law, and it may be decided by the judge on a pretrial motion. See *Acevedo-Cordero*, 958 F. 2d at 23. When the material facts are genuinely disputed, however, the question is properly treated as a question of fact, and its disposition must await the trial.

Id. at *13 (emphasis added).

Appendix D

The present submissions lead this court to the belief that genuine disputes regarding material facts will affect the ultimate determination of legislative immunity. For example, a dispute exists as to whether the City Council influences the daily operations of the New Bedford police department on a case-by-case basis. These areas of dispute remain genuine disputes of material fact to be determined at trial. *Acevedo-Cordero v. Cordero-Santiago*, 958 F. 2d 20, 23 (1st Cir. 1992). This court also recognizes that it may be too early in this case for the relevant facts to be sufficiently developed. Especially is this true for the council defendants, who were only recently, in December of 1996, added to the complaint.

For these reasons, the council defendants' motion for summary judgment is dismissed without prejudice. The council defendants must answer the complaint within ten days of July 28, 1997, the date of the court's decision on the record to deny the motion for summary judgment. The court will, however, stay proceedings on the claims against the council defendants pending the Supreme Court's decision in the *Scott-Harris* case.

IV. Discovery Motions

As stated and explained in the hearing on July 28, 1997, the court allows the plaintiffs' first and second motions to compel. The defendants are required to turn over all documents requested in those motions to compel, or else describe any document not produced and explain the asserted good cause for not producing. If good cause for not producing is asserted as to a document, the defendant(s) will bring the document to the hearing set for October 23, 1997 at 3:00 p.m.

Decision on the Plaintiffs' Motion for Attorneys Fees is deferred until this hearing.

Appendix D

Also, the plaintiffs' and defendants' cross motions for extension of discovery deadlines (included in Docket No. 75 and 77) are allowed to the following extent. Discovery will be extended, for good cause, as to the issues pertinent to Count VI of the amended complaint, and as to pattern and practice issues that were the subject of the motions to compel decided July 28, 1997.

V. Trial Date

As stated in the hearing on July 28, 1997, the court has allowed a motion to extend the trial date in this case. The trial date set for Sept. 29, 1997 is cancelled. A new trial date is set for April 13, 1998 at 9:00 a.m. Final pre-trial conference is set for April 2, 1998 at 3:30 p.m.

VI. ORDER

For the foregoing reasons, it is ordered:

(1) Council Defendants' Motion to Extend Time to File Answer (Docket No. 52, filed January 8, 1997) is ALLOWED.

(2) Council Defendants' Motion for Summary Judgment as to Count VI of the Amended Complaint (Docket No. 33, filed January 17, 1997) is DISMISSED WITHOUT PREJUDICE. Proceedings in this civil action are stayed *only as to* claims asserted in Count VI, once answers have been filed on behalf of council defendants.

(3) Plaintiffs' First Motion to Compel (Docket No. 75, filed April 9, 1997) is ALLOWED.

Appendix D

(4) Plaintiffs' Second Motion to Compel (Docket No. 78, filed May 15, 1997) is ALLOWED.

(5) The parties' cross motions to extend discovery are ALLOWED (included in Dockets No. 75 and 77) to the extent that discovery is extended as to the issues pertinent to Count VI of the amended complaint and as to the pattern and practice issues that were the subject of the motions to compel decided on July 28, 1997.

s/ Robert E. Keeton
United States District Judge